

SENATE RECORD VOTE ANALYSIS

104th Congress
1st Session

Vote No. 84

February 28, 1995, 3:13 p.m.
Page S-3275 Temp. Record

BALANCED BUDGET AMENDMENT/No Presidential Impoundment Authority

SUBJECT: A Resolution Proposing a Balanced Budget Amendment to the Constitution of the United States . . . H.J. Res. 1. Hatch motion to table the Kennedy amendment No. 267.

ACTION: MOTION TO TABLE AGREED TO, 62-38

SYNOPSIS: Pertinent votes on this legislation include Nos. 62-63, 65-83, and 85-98.

As passed by the House, H.J. Res. 1, a resolution proposing a Balanced Budget Amendment to the Constitution, is virtually identical to the balanced budget constitutional amendment that was considered last year by the Senate (see 103d Congress, second session, vote Nos. 47-48). The resolution: will require a three-fifths majority vote of both Houses of Congress to deficit spend or to increase the public debt limit; will require the President's annual proposed budget submission to be in balance; and will require a majority of the whole number of each House to approve any bill to increase revenue. Congress will be allowed to waive these requirements for any fiscal year in which a declaration of war is in effect. Congress will enforce and implement this amendment by appropriate legislation. The amendment will take effect in fiscal year 2002 or with the second fiscal year beginning after its ratification, whichever is later. The States will have 7 years to ratify the amendment.

The Kennedy amendment would add the following to the balanced budget amendment, "Nothing in this article shall authorize the President to impound funds appropriated by Congress by law, or to impose taxes, duties, or fees."

Debate was limited by unanimous consent. Senator Hatch moved to table the Kennedy amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

Those favoring the motion to table contended:

Each time a balanced budget amendment to the Constitution has been debated in the past couple of decades the false claim that it will give the President impoundment and taxing authority has risen from the grave. The arguments in favor of this claim are specious, so each time the corpse has been easily reburied, but apparently our colleagues cannot resist digging it up yet again because

(See other side)

YEAS (62)			NAYS (38)		NOT VOTING (0)	
Republicans (53 or 100%)	Democrats (9 or 19%)		Republicans (0 or 0%)	Democrats (38 or 81%)	Republicans (0)	Democrats (0)
Abraham	Hutchison	Bryan	Akaka	Johnston		
Ashcroft	Inhofe	Campbell	Baucus	Kennedy		
Bennett	Jeffords	Exon	Biden	Kerrey		
Bond	Kassebaum	Feinstein	Bingaman	Kerry		
Brown	Kempthorne	Heflin	Boxer	Kohl		
Burns	Kyl	Hollings	Bradley	Lautenberg		
Chafee	Lott	Reid	Breaux	Leahy		
Coats	Lugar	Robb	Bumpers	Levin		
Cochran	Mack	Simon	Byrd	Lieberman		
Cohen	McCain		Conrad	Mikulski		
Coverdell	McConnell		Daschle	Moseley-Braun		
Craig	Murkowski		Dodd	Moynihan		
D'Amato	Nickles		Dorgan	Murray		
DeWine	Packwood		Feingold	Nunn		
Dole	Pressler		Ford	Pell		
Domenici	Roth		Glenn	Pryor		
Faircloth	Santorum		Graham	Rockefeller		
Frist	Shelby		Harkin	Sarbanes		
Gorton	Simpson		Inouye	Wellstone		
Gramm	Smith					
Grams	Snowe					
Grassley	Specter					
Gregg	Stevens					
Hatch	Thomas					
Hatfield	Thompson					
Helms	Thurmond					
	Warner					

EXPLANATION OF ABSENCE:

1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

they find that it makes such a convenient scare tactic.

If this constitutional amendment conferred tax or impoundment authority on the President Members would be justifiably concerned. However, it does not. The only new duty this constitutional amendment will place on the President is to submit a balanced budget proposal to Congress each fiscal year. The duty to enforce the amendment is placed squarely on Congress. Under section 6 of the amendment, Congress must mandate exactly what type of enforcement mechanism it wants, whether it be sequestration, rescission, the establishment of a contingency fund, or some other mechanism. The President, as Chief Executive, will be duty bound to enforce a particular requisite congressional scheme to the exclusion of impoundment.

That the President must enforce a mandatory congressional budgetary measure has been the established law since the nineteenth century case of *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 542 (1838). In *Kendall*, Congress had passed a private act ordering the Postmaster General to pay Kendall for services rendered. The Supreme Court rejected the argument that Kendall could not sue in mandamus because the Postmaster General was subject only to the orders of the President and not to the directives of Congress. The Court held that the President must enforce any mandates in a congressional spending measure pursuant to his duty to execute faithfully the law as required by article II, section 3 of the Constitution. The *Kendall* case was given new vitality in the 1970's, when lower Federal courts, as a matter of statutory construction, rejected attempts by President Nixon to impound funds without express congressional approval (for example, see *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973)). In short, the President will only have impoundment power if Congress explicitly gives him that power when it fulfills its duty under section 6 of this amendment to write legislation to enforce and implement it.

Nevertheless, our colleagues have suggested three preposterous "what if" conditions. They have asked, what if Congress ignores its duty to pass implementing and enforcing legislation, and then what if it runs a deficit, and then what if it ignores its constitutional responsibility to either vote in favor of that deficit or provide for its elimination? Even assuming that Congress may act so dishonorably and recklessly, it is a mistake to assume that it will then be willing to cede impoundment authority to the President. Any act that the President takes that invades Congress' spending authority will be immediately challenged by Members.

The argument that our colleagues have made that this constitutional amendment will give the President the authority to raise taxes is stretched beyond all credulity. It is a constitutional impossibility. Presidents simply do not have the power to raise taxes and the balanced budget amendment will not alter this fact. The power to raise taxes is exclusively given to Congress by article I of the Constitution. All the balanced budget amendment will do is limit Congress' spending, taxing, and borrowing powers--it will not transfer them.

It makes a fine scare tactic to allege that this constitutional amendment will give the President the power to impound funds and raise taxes. The only problem with the allegation is that it is false. We therefore urge our colleagues to vote in favor of the motion to table the Kennedy amendment.

Those opposing the motion to table contended:

In its current form this balanced budget constitutional amendment will give the President the power to impound funds, and even to impose taxes. In fact, it will be his constitutional duty to do so if certain conditions are met. This constitutional amendment will flatly prohibit spending from exceeding revenues unless both the House and the Senate authorize a specific deficit. The President is sworn to uphold the Constitution. If Congress runs a deficit without authorizing it, the President will have to eliminate it. Though our colleagues disparage the likelihood of such a deficit occurring, we do not see it as such a remote possibility. For example, Congress may realize that it has allowed for a large deficit, but may lack the political will to authorize it, cut spending, or raise taxes. Alternatively, an unanticipated economic downturn could cause anticipated revenues to decline drastically, leading to a deficit.

The Constitution trumps all laws. Any attempt by Congress to dictate how the President must proceed in such a situation would be futile. As the Supreme Court recognized in *re Neagle*, the President's obligation to execute faithfully the laws is independent of Congress. That duty is not limited to enforcement of facts; it includes the rights, duties, and obligations growing out of the Constitution itself. When the President is confronted with a deficit, he will have every right to impound funds to bring the budget into balance. He may eliminate entire programs, he may make across-the-board cuts, he may target programs in particular States. His discretion will be enormous. The power to impound is much greater than the power of a line-item veto. Line-item veto authority is restricted to items in particular appropriations bills; impoundment authority, on the other hand, gives total discretion to the President on where to make cuts.

Further, we do not believe that the President will be restricted to making cuts to bring the budget into balance. If he believes that the appropriate way to exercise his constitutional duty to eliminate a deficit is to raise taxes, he will have every right to do so. We are not alone in this opinion; Assistant Attorney General Walter Dellinger has testified that he believes that this constitutional amendment will give the President the right to raise taxes to eliminate a deficit.

Some Senators have insisted that Congress will never abdicate its constitutional responsibility not to deficit-spend without expressly authorizing such spending, and they have further insisted that the enforcement authority given Congress by the amendment will stop the President from impounding funds or raising taxes. We are unpersuaded. If our colleagues are certain that the President will not gain this authority, then they should be willing to write it into the amendment. They should join us in opposing this motion

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to table the Kennedy amendment.